Motion to dismiss

764

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 895.

FRANCIS E. HINCKLEY, APPELLANT,

vs.

LEVI P. MORTON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 30, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 895.

FRANCIS E. HINCKLEY, APPELLANT,

vs.

LEVI P. MORTON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Thomas Drummond, presiding judge of said court, and the Hon. Samuel H. Treat, associate judge of said court, on Wednesday, the 21st day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fifth year.

J. A. JONES, *Clerk.*

LEVI P. MORTON ET AL.
vs.
THE GILMAN, CLINTON AND SPRINGFIELD Railroad Company. } In chancery.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that heretofore, to wit, on the 5th day of May, in the year of our Lord one thousand eight hundred and eighty, came Francis E. Hinckley, former receiver in said cause, by Messrs. Higgins, Furber and Cothran, his solicitors, and filed in the office of the clerk of said court his certain petition and exhibits thereto in said cause, which are in the following words, to wit:

2

Petition.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States.

LEVI P. MORTON ET AL.
vs.
THE GILMAN, CLINTON AND SPRINGFIELD Railroad Company. } In chancery.

Your petitioner, Francis E. Hinckley, respectfully represents unto your honor that on or about the 24th day of November, 1873, your petitioner was appointed receiver of the Gilman, Clinton and Springfield Railroad, by an order of the circuit court of McLean County and the State of Illinois, entered in the suit of Joseph J. Kelly et al. against the Gilman, Clinton and Springfield Railroad Company et al.

That on the 23d day of June, 1875, one Levi P. Morton and others, claiming to be the holders of sundry bonds issued by the Gilman, Clinton and Springfield Railroad Company, and secured by a trust deed made to Thomas A. Scott and Hugh J. Jewett as trustees, thereby conveying the railroad property of the defendant railroad company for the purposes therein stated, filed a bill in the circuit court of McLean County wholly independent of the cause above stated, seeking a foreclosure of the trust deed, and a sale of the property for their benefit; that thereafter, and on the 23d day of June, 1875, the said Scott and Jewett, as trustees named in said trust deed, came into said court of McLean County, and became parties to the said suit of Morton and others against the said railroad company, and from that time litigation in the above cause was carried on in their names; that thereafter, to wit, on the 12th day of August, 1875, the said Scott and Jewett appeared in both said causes then pending in the circuit court of McLean County, and applied for an order directing your petitioner, then receiver,

3

to transfer said property to them as such trustees, which order was made accordingly; that prior to said date the appointment of your petitioner as receiver in the Kelly case was extended to said
4 cause of Morton et al. against said railroad company, all of which more specifically and fully appears by reference to the pleadings, orders, and judgments of said circuit court of McLean County, now on file in this court in the above cause, but that your petitioner remain receiver of the railroad of the said defendant railroad company by virtue of his said appointment in the said Kelly case, subject wholly to the urisdiction of the said circuit court of McLean County, which said circuit court of McLean County had and retained from the commencement of said last-named suit full and complete jurisdiction from thence to now.

That afterwards, to wit, on the 12th day of December, 1875, the said cause of Morton and others against said railroad company was removed from the said circuit court of McLean County to this court, leaving the said cause of Kelly and others against said railroad company remaining in said circuit court of McLean County still pending and undetermined, and wholly subject to its jurisdiction; that thereafter the said circuit court of the United States referred to one Ezra M. Prince, as special master, certain matters and things in relation to the action of
5 your petitioner, as receiver in the said case of Morton et al. against the said railroad company, and that such proceedings were had in relation thereto that said master allowed to your petitioner the sum of ten thousand dollars for compensation as such receiver, and that in the said case of Morton et al. against said railroad company, said special master Prince in said accounting charged against your petitioner as such receiver the sum of four thousand three hundred and sixty dollars as interest on monthly balances, and the further sum of five hundred dollars, voucher number 1164, which your petitioner, as such receiver, had paid to his attorney, thereby making the sum charged against said allowance in the amount of four thousand eight hundred and sixty dollars, thereby leaving in said cause to your petitioner the sum of five thousand one hundred and forty dollars for his compensation as such receiver; that thereafter the said cause of Kelly and others against said railroad company was stricken from the docket in said circuit court of McLean County, without notice to your petitioner, with leave, however, to reinstate, and thereafter said cause was duly reinstated; that the
6 said Special Master Prince further found in and by his said report that your petitioner, as such receiver, was indebted to said estate in the sum of eighteen thousand seven hundred and seventy-six dollars and twenty five cents; and that by an order of this honorable court said report in all things stood confirmed, from which your petitioner appealed to the Supreme Court of the United States; that upon the hearing and consideration of said appeal the said Supreme Court of the United States affirmed the judgment of this honorable court in the matter aforesaid, but in and by the opinion of said court it was substantially found, among other things, that it did not appear in the said record before the said Supreme Court of the United States in the case of Levi P. Morton et al. against said railroad company that an accounting had been had with your petitioner, as such receiver, in said Kelly case in the circuit court of McLean County, nor had his accounts been passed upon, nor had any compensation been allowed him for his services rendered in said case.

Your petitioner further represents that after the judgment of
7 the said Supreme Court of the United States, the said case of Kelley et al. against said railroad company was reinstated in

the said circuit court of McLean County, and placed upon the docket; and that the accounts of your petitioner together with the question of compensation to be allowed him for services rendered in said cause as such receiver, and the *the* amount including his expenses as the receiver in said cause of Kelley et al. against said railroad company, were referred to one Martin Beem, a member of the bar in the city of Chicago, as special master, to take an accounting and report the same to the said circuit court of McLean County; that your petitioner caused notices to be served upon the parties named in the said order of reference to said Special Master Beem; that he would proceed on Monday, the 29th day of March 1880, to take proof before said Special Master Beem in relation to the matters and things contained in said order of reference as aforesaid. That in accordance with said notices your petitioner did proceed before the said Special Master Martin Beem to take said evidence,
8 which said testimony was concluded on Saturday, the third day of April, 1880, and that upon said day and upon the conclusion of said testimony, the said Martin Beem, as special master, so appointed by the said circuit court of McLean County as aforesaid, proceeded to make his report thereon, a certified copy of which is hereto attached, marked Exhibit A. And that said report of said Special Master Beem was filed in the said circuit court of McLean County on the 5th day of April, 1880 (a copy of which is hereto annexed Exhibit A).

That immediately upon the filing of the said report of the said special master, the said circuit court of McLean County adjourned to the term of court in course, which said term of court in course would convene on the 26th day of April, 1880, and that thereby said report stood for confirmation on the said 26th day of April, 1880, on the first day of the next term of said circuit court of McLean County, after the filing of said petition, unless objections thereto were filed; that the clerk of the said circuit court of McLean County, under direc-
9 tions of the then presiding judge thereof, immediately notified R. Biddle Roberts, esq., of counsel herein, that the said report had been filed in said court, and that the same would be presented for confirmation and decree thereon on the said 26th day of April, 1880.

And your petitioner further represents that said R. Biddle Roberts, esq., was fully notified of the filing of the said report of said special master, and the contents of said report, by the reading of the petition of your petitioner in this honorable court, on the 9th day of April, 1880, which said petition, so read in the presence of the said R. Biddle Roberts, esq., had annexed thereto a certified copy of the report of the said special master Beem, which report was read in open court in the presence of the said counsel, and that the said petition to which said report was annexed contained the averment that application would be made for the confirmation of said report of said special master Beem, on the 26th day of April, 1880, before the said circuit court of McLean County.

That your petitioner, by counsel, did appear before the said circuit court of McLean County, on the first day of the April term
10 thereof, to wit, on the 26th day of April, 1880, and moved the court to enter a decree upon said report of said special master Beem, thereby confirming and approving the same in all things, and that although no objections had been filed or taken to said report of said special master, one Robert E. Williams, a member of the bar of said circuit court of McLean County, and formerly counsel for the complainants in the above entitled cause, appeared and opposed the confirmation of said report, as your petitioner is informed and believes; that the said circuit court of McLean County, after hearing the said motion

for the confirmation of said report of said special master Beem, made and entered a decree fully approving and confirming said report of said special master Beem in all things, a certified copy of which decree is hereto attached, and marked Exhibit C.

Your petitioner further represents that in and by the said decree so confirming and approving the said report of the said Special Master Beem, as aforesaid, the said circuit court of McLean County decreed that your petitioner was entitled to receive the sum of twenty-
11 four thousand five hundred and thirty-five dollars and eighty cents ($24,535.80) as compensation for services as receiver in the said cause of Kelly et al. against the said defendant railroad company, and the further sum of one thousand dollars for expenses necessarily paid out by your petitioner in and about the business of said receivership, which said decree of said circuit court of McLean County still remains in full force and effect, and unsatisfied.

Your petitioner hereby presents the said decree of the said circuit court of McLean County, and prays that your honor will enter an order herein, thereby allowing to your petitioner said sums of money so decreed in favor of your petitioner in and by said decree of the circuit court of McLean County, as aforesaid, and direct an order that the same be paid to your petitioner out of any funds now in the hands of this court, or that may hereafter come into this court, or into the hands of any of its officers in the above entitled cause.

FRANCIS E. HINCKLEY.

GEO. W. CATHRAN,
Of Counsel for Petitioner.
G. W. KRETZINGER,
Sol. for Petitioner.

12 STATE OF ILLINOIS,
Cook County, ss:

Francis E. Hinckley, on oath, states that he is the person named in the foregoing petition; and that he has read the same and knows the contents thereof; and that the same is true as therein stated and set forth, except as to matters and things stated on information and belief, and as to those matters he verily believes the same to be true.

FRANCIS E. HINCKLEY.

Subscribed and sworn to before me this 30th day of April, 1880.
[L. S.] CHAS. E. BYRNE,
Notary Public.

(Endorsed:) Filed May 5, 1880. J. A. Jones, clerk.

EXHIBIT A.

STATE OF ILLINOIS,
McLean County, ss:

In the circuit court of said county.

13 JOSEPH J. KELLY ET AL.
vs.
THE GILMAN, CLINTON, AND SPRINGFIELD Railroad Company et al.

To the honorable O. T. Reeves, judge of the circuit court of the county of McLean, in the State of Illinois, in chancery sitting:

In pursuance of the order of this court made in the above entitled

cause, on the 11th day of March, A. D. 1880, whereby the matters named in said order were referred to me as special master in chancery of this court, to take evidence in relation to the same, and to report my findings thereon, I, the said special master, do hereby respectfully certify and report that notice having been given to the above complainant, Joseph J. Kelly, and the defendant railroad company, and being attended by counsel, there appeared before me Francis E. Hinckley, Samuel C. Smith, John E. Blunt, and Eugene Ellery, witnesses on behalf of the said Francis E. Hinckley, late receiver of the railroad of the defendant railroad company, and that they were examined
14 upon oath "viva voce" as such witnesses; and that their testimony so given and reduced to writing, is contained in a schedule hereto annexed, and marked No. 1.

I do further certify and report that in my opinion the accounts of the said Francis E. Hinckley, as late receiver of the Gilman, Clinton and Springfield Railroad, and the reports of his acts and doings as such, made to the above court from time to time, attached to the testimony of the said Francis E. Hinckley, and marked Exhibit A, are correct.

I further find and report that all the books and accounts of the said Francis E. Hinckley, as such receiver, were fully and thoroughly examined by four auditors appointed in the above cause by this honorable court, and that the said auditors found said books and accounts accurate and correct in all things except to the sum of twenty-eight cents, which was charged against the said Francis E. Hinckley, when it should have been credited.

I find from an examination of said accounts that the said Francis E. Hinckley charged and retained for compensation for his services
15 as such receiver, two and one half per cent. upon the receipts and disbursements made by him as such receiver, which aggregates the sum of twenty-four thousand five hundred and thirty-five dollars and eighty cents ($24,535.80), and that he was appointed receiver in the above cause on the 24th day of November, A. D. 1873, and from thence managed and operated the road of the above defendant railroad company as such receiver, under the orders of this court, until the 28th day of August, 1875, at which last date he was discharged by an order entered in the above cause by this honorable court, to which order reference is here made, and that he continued to perform necessary services in closing up his accounts with said estate for more than three months thereafter.

I further find and report that in my opinion the said sum of twenty-four thousand five hundred and thirty-five dollars and eighty cents so retained by the said Hinckley as compensation for his services as such receiver is reasonable. In addition to these services rendered it appears from the evidence, that the said Hinckley, as such receiver, in the
16 course of the discharge of his duties, and in and about the same, be paid for personal expenses what he estimates at the sum of five hundred dollars per annum, which expenses were not stated in his accounts.

It is therefore my opinion and I recommend that the said accounts of the said Francis E. Hinckley, as receiver of the railroad of the defendants' railroad company, should be passed and approved, and his reports in relation thereto approved and confirmed in all things, and that the said sum of twenty-four thousand five hundred and thirty-five dollars and eighty cents be allowed him for compensation for services as such receiver, and that he be further allowed the said sum of one thousand

dollars for monies paid out by him as such receiver in and about his discharge of the duties of said receivership as above found.

MARTIN BEEM,
Special Master.

STATE OF ILLINOIS,
McLean County, ss:

I, J. C. McFarland, clerk of the circuit court of McLean County,
17 in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the report of master filed in our said court, in a certain cause therein pending on the chancery side thereof, wherein Joseph J. Kelly et al. are complainants & the G., C. & S. R. R. Co. are defendants, except the exhibits & the evidence. I further certify that said court adjourned on the 5th day of April, 1880, for the February term, 1880.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Bloomington, Ill., this 5th day of April, A. D. 1880.

[L. S.] J. C. McFARLAND, *Clerk*,
By M. E. FERGUSON, *Deputy*.

(Endorsed:) Filed May 5, 1880. J. A. Jones, clerk.

EXHIBIT C.

STATE OF ILLINOIS,
McLean County, ss:

In the circuit court of said county.

18 JOSEPH J. KELLY ET AL.
vs.
THE GILMAN, CLINTON AND SPRINGFIELD Railroad Company et al.

And now this cause coming on to be heard, and it appearing to the court that a petition of Francis E. Hinckley, receiver of the above defendant railroad company filed herein, and the report of Martin Beem, a special master in chancery of this court appointed by an order of reference upon said petition of said Hinckley, to whom was referred the matters and things in said petition of Hinckley contained; and it appearing to the court that Joseph J. Kelly, the principal complainant, and the Gilman, Clinton and Springfield Railroad Company, the principal defendant in the above cause, were duly notified of the time and place appointed by said special master in chancery to take evidence and report his findings upon the matters and things contained in said petition of said Hinckley; and said testimony having been taken and the findings thereon made by the said special master:

19 Now, therefore, this cause comes on to be heard upon the said report of said special master, and the court being duly advised in the premises, it is ordered, adjudged, and decreed that the said report be is hereby approved and confirmed in all things, and the said accounts of the said Francis E. Hinckley, as receiver of the railroad of the above defendant railroad company, are hereby passed and approved, and his reports of his acts and doings as such receiver are hereby ap-

proved and confirmed in all things, and the compensation for services of twenty-four thousand five hundred and thirty-five dollars and eighty cents ($24,535.80) and allowance of expenses of the sum of one thousand dollars, recommended by the said Martin Beem, as special master, to the said Francis E. Hinckley, for compensation for services rendered by him as such receiver in the above cause are hereby allowed and approved, and the costs of this proceeding to be paid by Francis E. Hinckley.

STATE OF ILLINOIS,
McLean County, ss:

20 I, J. C. McFarland, clerk of the circuit court of McLean County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of decree of confirmation of the special master's report had of record in our said court, in a certain cause lately therein pending, on the chancery side thereof, wherein Joseph J. Kelly et al. are plaintiff and Gilman, Clinton & Springfield R. R. Co. et al. are defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Bloomington, Ills., this 26 day of April, A. D. 1880.

[L. S.] J. C. McFARLAND, *Clerk.*

(Endorsed:) Filed May 5, 1880. J. A. Jones, clerk.

And afterwards, to wit, on Monday, the 10th day of May, at the January term of said court, in the year aforesaid, the following proceedings were had in said court and entered of record in said cause, to wit:

20½ *Order as to deposit of money.*

LEVI P. MORTON ET AL.
vs.
THE GILMAN, CLINTON AND SPRINGFIELD RAILroad Company et al. } In equity.

And now on this 10th day of May, 1880, comes Francis E. Hinckley, and brings into court the sum of $22,868.63 in discharge and satisfaction of the order entered in this cause on September 25th, 1876; and of the attachment issued in this cause against him on the 3d of April, 1880.

And it is ordered by the court, that said sum be deposited in the registry of the court, subject to the further order of the court, as to the proper disposition of the same.

21 And afterwards, to wit, on Wednesday, the 21st day of July, at the June term of said court, in the year aforesaid, the following further proceedings were had in said court, and entered of record in said cause, to wit:

Final decree.

LEVI P. MORTON ET AL.
vs.
THE GILMAN, CLINTON AND SPRINGFIELD Railroad Company. } In equity.

The petition of Francis E. Hinckley, filed May 5, 1880, herein, having

been heretofore argued by the counsel of the respective parties and considered by the court, it is ordered that the prayer of the said petition be refused and the same be dismissed with costs.

And then, afterwards, to wit, on Monday, the 26th day of July, at the term and in the year last aforesaid, the following further proceedings were had in said court and entered of record in cause, to wit:

Order allowing appeal.

LEVI P. MORTON ET AL.
vs.
GILMAN, CLINTON AND SPRINGFIELD RAILroad Company et al. } In equity.

22 And now, on this day, comes Francis E. Hinckley, intervening petitioner herein, and prays an appeal to the Supreme Court of the United States from the decree of the court heretofore made on the twenty-first day of July, instant, dismissing his petition herein, which is allowed by the court upon his giving bond, with security satisfactory to the court; and the said Hinckley thereupon files his bond, with Joseph K. Barry, J. Irving Pearce, and George W. Cothran, as sureties, in the penal sum of six thousand dollars, which is approved by the court, and the said bond is made a supersedeas.

And afterwards, to wit, on said 26th day of July, in the year aforesaid, came said petitioner, by his attorneys, and filed in the said clerk's office his appeal bond in said cause, which is in the following words, to wit:

Appeal bond.

Supreme Court of the United States.

LEVI P. MORTON ET AL.
vs.
THE GILMAN, CLINTON AND SPRINGFIELD Railroad Company. } In chancery.

23 Know all men by these presents that we, Francis E. Hinckley, Joseph K. Barry, J. Irving Pearce, and George W. Cathran, of the city of Chicago, State of Illinois, are held and firmly bound unto Levi P. Morton and others in the sum of six thousand dollars, to be paid to the said Levi P. Morton and others, their executors or administrators, for which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 23d day of July, 1880.

Whereas the above-named Francis E. Hinckley hath taken an appeal to the Supreme Court of the United States to reverse a decree rendered in the above-entitled cause by the circuit court of the United States for the southern district of Illinois, and entered in the office of the clerk of said court, at Springfield, Illinois, on the 21st day of July, 1880, dismissing the petition of Francis E. Hinckley for the payment to him of certain monies now in said court:

Now, therefore, the condition of this obligation is such, that if
24 the above-named Francis E. Hinckley shall prosecute his said appeal to effect and answer all costs and damages if he shall fail to

make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

FRANCIS E. HINCKLEY. [L. S.]
JOSEPH K. BARRY. [L. S.]
J. IRVING PEARCE. [L. S.]
GEO. W. COTHRAN. [L. S.]

Sealed and delivered in the presence of—

This bond is satisfactory.

R. BIDDLE ROBERTS,
Sol. for Appellees.

JULY 24, 1880.

This bond approved as a supersedeas bond.

THOMAS DRUMMOND.

JULY 26, '80.

(Endorsed): Filed July 26, 1880. J. A. Jones, clerk.

25 UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, John A. Jones, clerk of the circuit court of the United States within and for the southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and proceedings thereon had in the matter of the petition of F. E. Hinckley, filed May 10, 1880, in a certain cause, wherein Levi P. Morton et al. are complainants, and the Gilman, Clinton and Springfield Railroad Company et al. are defendants, as fully as same appear of file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this seventh day of September, in the year of our Lord one thousand eight hundred and eighty, and of our independence the one hundred and fifth year.

[SEAL.] J. A. JONES, *Clerk.*

26 Supreme Court of the United States, of December term, in the year of our Lord one thousand eight hundred and eighty.

LEVI P. MORTON ET AL.
vs.
THE GILMAN, CLINTON AND SPRINGFIELD Railroad Company. } In chancery.

In re the petition of Francis E. Hinckley, appellant, for payment to him of certain funds in court in above cause.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Francis E. Hinckley, appellant, by Leonard Swett, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

I. That said circuit court erred in refusing the prayer of the petition of said Francis E. Hinckley and in dismissing said petition.

II. That said circuit court erred in holding and deciding that the question of the compensation of said Francis E. Hinckley, as receiver

in the Kelley case, had been determined by the Supreme Court of the United States, on a former appeal taken by him from another order made in this cause.

III. There being no other claimant for the moneys in court in this cause, and none of the facts set forth in said Hinckley's petition being denied, he was entitled to the money as matter of right.

(Endorsement on cover:) No. 895. Francis E. Hinckley, appellant, vs. Levi P. Morton et al. S. Illinois C. C. U. S. Filed 30th September, 1880.

OFFICE
FILED
JAN 3 1881
JAMES H. MCKENNEY, CLK

IN THE

SUPREME COURT OF UNITED STATES,

OF OCTOBER TERM, A. D. 1880.

FRANCIS E. HINCKLEY,
vs.
LEVI P. MORTON, ET AL.
No. 885.

ENTERED ON THE DOCKET OF THE SUPREME COURT OF THE UNITED STATES IN THE MANNER FOLLOWING:

LEVI P. MORTON, ET AL.,
vs.
THE GILMAN, CLINTON & SPRINGFIELD RAILROAD COMPANY.

In re THE PETITION OF FRANCIS E. HINCKLEY, APPELLANT, FOR PAYMENT TO HIM OF CERTAIN FUNDS IN COURT IN THE ABOVE CAUSE.

Appeal

MOTION TO DISMISS THE [redacted] UNDER RULE 6, SUPREME COURT OF THE UNITED STATES.

R. BIDDLE ROBERTS,
Solicitor.

CHICAGO:
DONEY, BARNARD & CO., LEGAL PRINTERS, 100 RANDOLPH STREET.
1881.

IN THE

SUPREME COURT OF UNITED STATES,

OF OCTOBER TERM, A. D. 1890.

FRANCIS E. HINCKLEY,
vs.
LEVI P. MORTON, ET AL. } No. 895.

ENTERED ON THE DOCKET OF THE SUPREME COURT OF THE UNITED STATES IN THE MANNER FOLLOWING.

LEVI P. MORTON, ET AL.,
vs.
THE GILMAN, CLINTON & SPRINGFIELD RAILROAD COMPANY.

In re THE PETITION OF FRANCIS E. HINCKLEY, APPELLANT, FOR PAYMENT TO HIM OF CERTAIN FUNDS IN COURT IN THE ABOVE CAUSE.

Appeal

MOTION TO DISMISS THE WRIT OF ERROR UNDER RULE 6, SUPREME COURT OF THE UNITED STATES.

And now, to wit, comes Thomas A. Scott and Hugh J. Jewett, trustees for defendants in error, by R. Biddle Roberts, their attorney, and move to dismiss this appeal, and to affirm the order of the court below as to the payment of money now in court, with damages and costs, for the following reasons:

First. This case has been already decided by this Court, and the exact subject matter of the alleged Petition in this case by Francis E. Hinckley, the Receiver, were

expressly adjudicated by this Honorable Court in the case of

FRANCIS E. HINCKLEY, LATE RECEIVER,
vs.
THE GILMAN. CLINTON & SPRINGFIELD RAILROAD COMPANY.

Appealed from the Circuit Court of the United States for the Southern District of Illinois, being No. 90 on the Docket of this Court of October Term, 1879.

Opinion by Mr. Justice MILLER.

Second. The appeal in this case is based upon exactly the same allegations of error, and the errors assigned are almost verbatim the errors in No. 90 of the last term above referred to.

Third. That an attempt to adjudicate by a State Court upon a fund already in the hands of the Circuit Court of the United States for the Southern District of Illinois, upon which an appeal had been taken to this Court, and that appeal fully and clearly decided, is a judicial anomaly gotten up for the mere purpose of delay, and which certainly cannot receive the countenance of this Court.

Fourth. That this appeal is frivolous and grossly improper.

Brief and Argument in favor of the motion.

It is necessary to an understanding of this case that we should call the attention of the Court to the facts which appear of record in the case of *Hinckley* v. *The Gilman, Clinton & Springfield Railroad Company*, No. 90 of October Term, 1879.

10th Otto, 153.

The first page of the printed ~~report~~ Record in that case is as follows, and is re-printed here simply because it is the best history that can be given of this case.

"In the Supreme Court of the United States.

Appeal from the Circuit Court of the United States for Southern District of Illinois.

Francis E. Hinckley, Late Receiver, *Appellant.*
vs.
The Gilman, Clinton and Springfield Railroad Company, *Appellee.*

To obviate the necessity of examining a large part of the very voluminous record filed in this cause the following statement is agreed upon between the counsel of the parties to this branch of the case.

Levi P. Morton *et al.*, the holders of sundry bonds issued by the Gilman, Clinton and Springfield Railroad Company, secured by a deed of trust made to Thomas A. Scott and Hugh J. Jewett, as trustees, filed a bill in the Circuit Court of McLean County, State of Illinois, seeking a foreclosure of the trust deed and a sale of the property for their benefit.

Shortly prior to the filing of this bill, Joseph J. Kelly had filed a bill as a stockholder of said railroad in the same court, and Francis E. Hinckley, a citizen of Chicago, had been appointed receiver, and continued to discharge the duties of such officer pending the proceedings in both cases against the road.

On June 23d, 1875, Thomas A. Scott and Hugh J. Jewett, the trustees named in the deed of trust, came into said Circuit Court of McLean County, and became parties to the said suit of Morton *et al.*, against the railroad, and from that time the litigation was carried on in their names, the receiver still acting in both cases, and reporting to the Circuit Court of McLean County.

On the 13th day of December, 1875, the said cause was removed to the Circuit Court of the United States for the Southern District of Illinois, under the provisions of the act of Congress of March 8, 1875.

Prior to this, on August 12th, 1875, the property was ordered to be turned over to the trustees under the provisions of the mortgage, by order of the Circuit Court of McLean County, and the receiver directed to settle his accounts up to that date, and his accountability as such receiver ceased from the 28th day of August, 1875, the property having at that time been handed over by him to the agent of the trustees as aforesaid.

The subsequent proceedings in the Circuit Court of the United States for the Southern District of Illinois aforesaid were carried to completion, the sole parties then in court being the trustees and their *cestius qui trust*, and the said Gilman, Clinton and Springfield Railroad Company and its receiver, all other parties having been dismissed from the record. The final decree having been had, and the road having been sold by virtue thereof and a deed for the same duly executed and approved by the said court, and no appeal ever having been prayed.

G. W. KRETZINGER,
Sol. for Appellant.
R. BIDDLE ROBERTS,
Sol. for Appellee."

The court will observe that the original case instituted by Levi P. Morton *et al.*, as the holders of sundry bonds, issued by the Gilman, Clinton and Springfield Railroad Company, secured by a deed of trust, made to Thomas A. Scott and Hugh J. Jewett, as trustees, to which said Scott and Jewett became parties, was blended with the case of Joseph J. Kelly, in the Circuit Court of the United States for the Southern District of Illinois, and that the receiver *acted in both cases*, and reported *finally* to the Circuit Court of the United States for the Southern District of Illinois. The subjects of the assignment of error in that case, which were argued in this court on the 2d of December, 1879, *vide* printed report of that case page 15, as also the printed briefs filed by the counsel on both sides, involved but three questions, the principle one of which was the *compensation due the receiver.*

The opinion of Mr. Juctice MILLER upon the point was very full and decided, and the compensation which had been allowed by the Circuit Court of the United States was sustained by this court, and a decree entered accordingly. The attempt is made here upon what is called a "Petition," filed in the Circuit Court of the United States for the Southern District of Illinois, after the Mandate of this court had been sent to that court, and the court below had a simple duty to perform, to wit., to carry out the decree already entered, and which had been sustained by this court; for that court then to hear a petition of any sort from a Receiver, particularly when that petition is entirely based upon allegations of what is said to have occurred in the State court, after the decision of this court in another case, is about as bold an attempt to interfere with the decrees of this court as could well be brought before it. The record in this case exhibits nothing but this Petition, and certain exhibits, attached thereto. There is no evidence of the truth of the allegation that there was no other claimant for the moneys in court, and is totally unsustained by the record, and is an error in point of fact. Not only was there a claimant, but the court, by the very order which it had entered, had indicated the disposition intended to be made of the fund, which disposition this court, in the decision of the other case, had sustained.

A glance at the three errors assigned in this case is quite sufficient to ascertain all that has been stated in this brief. It is impossible for the appellant to escape from a pointed coincidence in the errors assigned now, and the errors assigned upon the former hearing. It is proper, in addition, to say, that the change in the title of the case, perhaps, adroitly made, for the purpose of misleading the court, is readily discovered from a glance at the *record filed in this case*, and the *record filed in No. 90 of the last term.* The original case, that of *Morton et al., and Scott*

and Jewett, trustees, v. *The Gilman, Clinton and Springfield Railroad Company*, was decided in the Circuit Court of the United States, for the Southern District of Illinois. The road was sold under the decree in that case, and no appeal was even prayed from it, nor any steps in that direction ever taken. Hinckley, the Receiver, did secure an appeal from the decree requiring him to pay over the balance of money in his hands. That became the case of *Francis E. Hinckley, late Receiver*, v. *The Gilman, Clinton and Springfield Railroad Company*, and is the No. 90 to which we have so often referred. It is now sought, apparently, to bring up the case of *Morton* v. *The Gilman, Clinton and Springfield Railroad Company*, making Hinckley's petition a sort of collateral issue, and upon that collateral issue bring to this court *again* a subject which was already decided in the No. 90. We apprehend this cannot be done, and respectfully pray that the appeal may be dismissed; that these parties may receive the money adjudicated as theirs some five years ago, and out of which they have been kept by this prolonged, and it is not too strong to say, under the decisions of this court, most improper litigation.

Respectfully submitted.

R. BIDDLE ROBERTS,

Solicitor.

FILED
JAN. 21 18
JAMES H. McKENNEY, C

IN THE

Supreme Court of United States,

OCTOBER TERM, A. D. 1880.

LEVI P. MORTON et al.,

vs.

THE GILMAN, CLINTON & SPRINGFIELD RAILROAD COMPANY.

No. 895.

IN RE THE PETITION OF FRANCIS E. HINCKLEY, APPELLANT, FOR PAYMENT TO HIM OF CERTAIN FUNDS IN COURT IN THE ABOVE CASE.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL.

GEO. W. COTHRAN,

Solicitor for Appellant.

LEONARD SWETT,

Of Counsel.

CHICAGO:

HORACE O'DONOGHUE, LEGAL PRINTER, 42 BRYAN BLOCK, 170 LA SALLE STREET.

1880.

IN THE

Supreme Court of United States,

OCTOBER TERM, A. D. 1880.

LEVI P. MORTON et al.,

vs.

THE GILMAN, CLINTON & SPRINGFIELD RAILROAD COMPANY.

No. 893.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL.

As we understand, the brief of the learned counsel in support of the motion to dismiss our appeal, it is based mainly, if not entirely, upon the ground of *res adjudicata*, the counsel *asserting* and insisting that the precise question presented to the court on this appeal had been previously presented and decided adverse to the present appellant.

We will not encumber our points with a citation of authorities to determine what is understood by *res adjudicata*. We simply call the court's attention to the fact that that rule only applies where the precise subject matter presented by the same facts, and between the same parties, has been heard and finally adjudicated, and when that fact properly appears to the court, the court will hold that adjudication final and conclusive, and will not re-examine the case.

If the counsel has brought us within that elementary rule, of course our appeal should be dismissed. But we contend that the counsel is entirely mistaken in his premises.

Our answer to counsel's position is :

I.

That *res adjudicata* is a defense, and to entitle a party to an action to the benefit of this defense, it must be pleaded and proven at the hearing of the cause the same as any other defense.

In this case, the decree which counsel insists constitutes *res adjudicata*, was neither pleaded nor proven at the hearing.

In order that this may be readily apparent to the court we have appended to this brief a copy of all but the formal parts of the Record brought up by this appeal.

By this Record it appears that there was not any answer of any kind made to the verified petition presented to the court below, nor was any proof of a decree of this court, of any kind, introduced in evidence.

The application to the court below was heard upon the verified petition and arguments of counsel on both sides, without a denial of a single fact stated in the petition. We well remember that his Honor, Judge DRUMMOND, at the hearing, asked the counsel who makes this motion, and who opposed the application in the court below, if he intended to file an answer controverting any of the facts stated in the petition, and he replied he did not.

Futhermore, your Honors will look in vain in the record brought up by this appeal, for any such stipulation of facts as is set forth on pages 3 and 4 of counsel's argument. No such stipulation was used on the hearing in the court below, nor is it a part of the record before the court on this hearing.

The counsel not having denied any of the allegations of our petition, and not having pleaded the pretended former recovery, nor offered any evidence in support thereof, we deny his right to attempt to make out such a defense in this court, for the first time.

II.

Another fatal objection to the counsel's position is the fact that the decree of this court, in the case referred to by counsel, was entered in November, 1879, whereas the decree of the McLean County Circuit Court, of the State of Illinois, upon which our petition was predicated, was entered April 26, 1880, about *six months thereafter*.

Your Honors will perceive, by the decree of the McLean Circuit Court attached hereto, that the Hon. R. Biddle Roberts, the counsel who makes this motion, had notice of the filing of the special master's report in the McLean County Circuit Court, and that his clients were represented by counsel on the hearing of the application for confirmation of that report, and which makes that decree conclusive upon his client. They had their day in court to oppose Hinckley's recovering his decree, and he having succeeded, and no appeal having been taken therefrom, they are concluded by the record from questioning the validity, equity or correctness of that decree, in any court and in any proceeding whatsoever.

From these facts this court will presume that whatever of defense his clients had to make to that application, was made and overruled. If he had a defense, and did not avail himself of it in that court, as he was notified to appear and make it, he is estopped from making such defense here, as this court cannot, under the law of its creation, entertain collateral attacks npon the judgment of State courts..

Nougue v. *Clapp*, 101 U. S. 551.

Possibly the counsel may reply that his clients, not being parties to the *Kelley* case in the McLean County Circuit Court, they had no right to appear.

The answer is, we conceded them the right, and had their counsel duly notified to appear, and had they appeared, it would not have rested with us to question their right to appear.

Thus it will appear that he had the opportunity to make any defense his clients may have had to Hinckley's proceeding to have his compensation as receiver fixed, and failing to do so, this court will consider the decree of the McLean Circuit Court (a copy of which constitutes a part of the record in this case) as having been duly rendered and in all respects valid.

We have thus established a valid decree in favor of the appellant for services as receiver of the Gilman, Clinton and Springfield Railroad Company in the *Kelley* case, rendered before the *Morton* case was removed to the Federal court.

The court will bear in mind that the *Kelley* case never was removed to the Federal court, but remained in the McLean Circuit.

III.

Let us, by briefly referring to the facts in this case, show how utterly without foundation this motion is.

By referring to the petition presented to the court below, it will be seen that the appellant was, on November 24, 1873, in the *Kelley* case, in the McLean County Circuit Court, appointed receiver of the Gilman, Clinton and Springfield Railroad.

That on June 23, 1875, Levi P. Morton and other stockholders of the Gilman, Clinton and Springfield Railroad Company, filed a bill in the McLean County Circuit Court for the foreclosure of the mortgage theretofore executed by the railroad company to Scott and Jewett, as trustees for the bondholders. On that day the trustees in that mortgage, Scott and Jewett, became parties to that suit. That thereupon Hinckley, the present appellant, was also appointed receiver in this Morton suit.

On August 12, 1875, on the application of the trustees, an order was made in the McLean County Circuit Court, in both of those cases, directing the receiver to

turn the road over to the trustees; but appellant was not removed as trustee in the *Kelley* case, nor for that matter in either case.

On December 12, 1875, the case of *Morton et al.* was removed to the United States Circuit Court for the Northern District of Illinois, but the *Kelley* case was not removed.

Hinckley having been appointed receiver in the *Morton* case after his appointment in the *Kelley* case, and that case having been removed to the Federal court, and he having been ordered to deliver the property to the trustees, he reported to the Federal court the balance in his hands, and that court ordered him simply to pay it into court.

Counsel, in his brief, says: "The court, by the very "order which it had entered, had indicated the disposition "intended to be made of the fund, which disposition this "court, in the decision of the other case, had sustained."

This statement of counsel is entirely gratuitous. The Federal court never made any such order. Its order was that Hinckley pay into court the balance reported to be in his hands, by the master.

This court, on Hinckley's appeal from this order directing him to pay this money into court, said "that the "decree from which this appeal is taken *merely orders the* "*appellant to pay the money into court, and makes no order* "*for its distribution.*" (10 Otto, 156.)

Thus it appears that Mr. Hinckley was receiver in the *Kelley* case from November 24, 1873, to June 23, 1875, when the *Morton* case was commenced in the McLean Circuit Court, and he was also appointed receiver in that case. That he remained receiver in both of such cases until he was ordered to turn the property over to the trustees, August 12, 1875, and the *Morton* case was not removed to the Federal court till December 12, 1875.

By referring to the opinion of the court in 10 Otto, 153, your Honors will see that there is nothing whatever con-

tained therein that at all affects the questions presented by this appeal. On the contrary, the court expressly says :

" It does not appear from this record that the *Kelley* " suit was prosecuted any further after the removal of the " foreclosure suit into the Federal court, nor do we know " enough of its character to decide whether anything of it " was left after the order of removal, or whether its sub- " ject matter was not necessarily removed with the other " suit."

" *No attempt to bring Hinckley to account in the State court is shown.*"

It is a fact, appearing by the record on the present appeal, that Hinckley, as receiver, had not had an accounting with the McLean Circuit Court, either in the *Kelley* case or *Morton* case, but that after the decision of this court on his appeal from the order directing him to pay a certain sum of money into court, his accounts, as receiver, and his claim for compensation as receiver in the State Court, and in the *Kelley* case was duly referred to a master, who took proof of and made a report, passing his accounts and fixing his compensation as receiver in the *Kelley* case, and on the application to confirm that report, the counsel, who makes this motion, had notice, and his clients were heard by counsel. A decree was entered in the McLean Circuit Court on April 26, 1880, confirming the master's report, a copy of each is in the record.

After the decision of this court above referred to, Hinckley paid into court the sum he was directed to pay in.

After the decree was entered in the McLean Circuit Court, on April 26, 1880, he presented his petition to the United States Circuit Court for the Southern District of Illinois, praying that said decree might be paid out of any funds in said court belonging to the Gilman, Clinton and Springfield Railroad Company, or its successors. He could present his petition to no other place, as the mortgage on the railroad had been foreclosed, and the road

had been sold, leaving a large deficiency. All the assets of that railroad company that remain is this fund in the Federal court.

From the decree denying this application the present appeal is taken.

If this court can see, from this statement of facts, and which are strictly within the record, that the matter of Hinckley's compensation as receiver in the *Kelley* case had been adjudicated upon by this, or any other court, before April 26, 1880, then it can see what it expressly said it could not see by the record on the appeal heretofore heard and decided by the court above.

Whether we are to prevail in our appeal is a different question from that as to whether the record shows that there has been a former adjudication, which precludes us from being heard on our appeal in this court.

The counsel has failed to show a single element of *res adjudicata*.

Moreover, even if the former decision was in law *res adjudicata*, it is not available to the counsel on this appeal, because:

I.—He had the opportunity to have pleaded and proved it in the McLean County Circuit Court on the reference to pass Hinckley's accounts and to fix his compensation.

This he omitted to do, and a valid irreversable decree was entered.

II.—He also had the opportunity to, and should have pleaded and proved it on the hearing in the court below, upon our application to have the moneys paid over under our petition.

This he also entirely failed to do.

We do not feel like criticising the ground of the decision of the Circuit Court in refusing our application, because we are unable to discover that it rests upon any ground but an *ipse dixit*.

IV.

The third ground upon which the motion to dismiss is based, is characteristic of the learned counsel.

Our answer is, that no attempt was made to have the McLean County Circuit Court " adjudicate " " upon a fund " already in the hands of the Circuit Court of the United " States," etc. All the McLean Circuit was asked to do was to refer the accounts of Mr. Hinckley as receiver and his claim for compensation for services rendered in the State court to a master, and the master having passed his accounts, and having taken testimony and fixed the amount of compensation he ought to receive, that court was asked to confirm that report, which it did after strenuous opposition on behalf of the counsel's client.

After this decree was thus entered, our petition was presented to the court having possession of the only remaining funds of the Gilman, Clinton and Springfield Railroad Company, and being also the court to which Mr. Hinckley had finally accounted for his action as receiver in the *Morton* case, which had been removed to that court.

We submit that our course was the only one that could have been pursued, and in which we did not, in the slightest, bring the State and Federal courts into collision. On the contrary, we fully recognized the prerogatives and decrees of both of these courts.

We therefore say this motion should be denied, and the appeal should stand for hearing on the docket.

GEO. W. COTHRAN,
Solicitor for Appellant.

LEONARD SWETT,
Of Counsel.

COPY RECORD.

LEVI P. MORTON ET AL.,
v.
THE GILMAN, CLINTON AND SPRINGFIELD RAILROAD COMPANY. } In Chancery.

SOUTHERN DISTRICT OF ILLINOIS—SS:

Be it remembered that heretofore, to wit, on the 5th day of May, in the year of our Lord one thousand eight hundred and eighty, came Francis E. Hinckley, former receiver in said cause, by Messrs. Higgins, Furber & Cothran, his solicitors, and filed in the office of the clerk of said court his certain petition and exhibits thereto in said cause, which are in the following words, to wit:

PETITION.

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF ILLINOIS. } SS:

In the Circuit Court of the United States.

LEVI P. MORTON ET AL.,
v.
THE GILMAN, CLINTON AND SPRINGFIELD RAILROAD COMPANY. } In Chancery.

Your petitioner, Francis E. Hinckley, respectfully represents unto your Honors that on or about the 24th day of November, 1873, your petitioner was appointed receiver of the Gilman, Clinton and Springfield Railroad, by an order of the Circuit Court of McLean County, in the State of Illinois, entered in the suit of Joseph J. Kelley et al. against the Gilman, Clinton and Springfield Railroad Company et al.

That on the 23d day of June, 1875, one Levi P. Morton and others, claiming to be the holders of sundry bonds issued by the Gilman, Clinton and Springfield Railroad Company, and secured by a trust deed made to Thomas A. Scott and Hugh J. Jewett, as trustees, thereby conveying the railroad property of the defendant railroad company for the purposes therein stated, filed a bill in the Circuit Court of McLean County wholly independent of the cause stated, seeking a foreclosure of the trust deed and a sale of the property for their benefit; that thereafter, and on the 23d day of June, 1875, the said Scott and Jewett, as trustees named in said trust deed, came into said court of McLean County and became parties to the said suit of Morton and others against the said railroad company, and from that time litigation in the above cause was carried on in their names; that thereafter, to wit, on the 12th day of August, 1875, the said Scott and Jewett appeared in both said causes then pending in the Circuit Court of McLean County, and applied for an order directing your petitioner, then receiver, to transfer said property to them as such trustees, which order was made accordingly; that prior to said date the appointment of your petitioner as receiver in the *Kelley* case was extended to said cause of Morton *et al.* against said railroad company, all of which more specifically and fully appears by reference to the pleadings, orders and judgments of said Circuit Court of McLean County, now on file in this court in the above cause, but that your petitioner remained receiver of the railroad of the said defendant railroad company by virtue of his said appointment in the said *Kelley* case, subject wholly to the jurisdiction of the said Circuit Court of McLean County, which said Circuit Court of McLean County had, and retained from the commencement of said last named suit, full and complete jurisdiction from thence to now.

That afterwards, to wit, on the 12th day of December, 1875, the said cause of Morton and others against said

railroad company was removed from the said Circuit Court of McLean county to this court, leaving the said cause of Kelley and others against said railroad company, remaining in said Circuit Court of McLean county still pending and undetermined, and wholly subject to its jurisdiction; that thereafter the said Circuit Court of the United States, referred to one Ezra M. Prince, as special master, certain matters and things in relation to the action of your petitioner as receiver in the case of Morton *et al.*, against the said railroad company, and that such proceedings were had in relation thereto that said master allowed to your petitioner the sum of ten thousand dollars for compensation as such receiver, and that in the said case of Morton *et al.* against said railroad company, said Special Master Prince, in said accounting charged against your petitioner, as such receiver, the sum of four thousand three hundred and sixty dollars as interest on monthly balances, and the further sum of five hundred dollars, voucher number 1164, which your petitioner, as such receiver, had paid to his attorney, thereby making the sum charged against said allowance in the amount of four thousand eight hundred and sixty dollars, thereby leaving in said cause to your petitioner the sum of five thousand one hundred and forty dollars for his compensation as such receiver; that thereafter the said cause of Kelley and others, against said railroad company, was stricken from the docket in said Circuit Court of McLean County without notice to your petitioner, with leave however, to reinstate, and thereafter said cause was duly reinstated; that the said Special Master Prince, further found in and by his said report, that your petitioner, as such receiver, was indebted to said estate in the sum of eighteen thousand seven hundred and seventy-six dollars and twenty-five cents; and that by an order of this Honorable Court said report in all things stood confirmed, from which your petitioner appealed to the Supreme Court of the United States; that upon the hearing and consideration of said appeal, the said Supreme

Court of the United States affirmed the judgment of this Honorable Court in the matter aforesaid, but in and by the opinion of said court it was subtantially found, among other things, that it did not appear in the said record before the said Supreme Court of the United States in the case of Levi P. Morton *et al.*, against said railroad company that an accounting had been had with your petitioner, as such receiver, in said *Kelley* case in the Circuit Court of McLean County, nor had his accounts been passed upon, nor had any compensation been allowed him for his services rendered in said case.

Your petitioner further represents that after the judgment of the said Supreme Court of the United States, the said case of Kelley *et al* against said railroad company was reinstated in the said Circuit Court of McLean County, and placed upon the docket; and that the accounts of your petitioner, together with the question of compensation to be allowed him for services rendered in said cause, as such receiver, and the amount including his expenses as the receiver in said cause of Kelley *et al.* against said railroad company, were referred to one Martin Beem, a member of the bar in the city of Chicago, as special master, to take an accounting and report the same to the said Circuit Court of McLean County; that your petitioner caused notices to be served upon the parties named in the said order of reference to said Special Master Beem; that he would proceed on Monday, the 29th day of March, 1880, to take proof before said Special Master Beem in relation to the matters and things contained in said order of reference as aforesaid. That in accordance with said notices your petitioner did proceed, before the said Special Master Martin Beem, to take said evidence, which said testimony was concluded on Saturday, the 3d day of April, 1880, and that upon said day, and upon the conclusion of said testimony, the said Martin Beem, as special master, so appointed by the said Circuit Court of McLean County as

aforesaid, proceeded to make his report thereon, a certified copy of which is hereto attached, marked Exhibit " A."

And that said report of said Special Master Beem was filed in the said Circuit Court of McLean County on the 5th day of April, 1880, (a copy of which is hereto annexed, marked Exhibit " A,"); that immediately upon the filing of the said report of the said special master, the said Circuit Court of McLean County adjourned to the term of court in course, which said term of court in course would convene on the 26th day of April, 1880, and that thereby said report stood for confirmation on the said 26th day of April, 1880, on the first day of the next term of said Circuit Court of McLean County, after the filing of said petition, unless objections thereto were filed; that the clerk of the said Circuit Court of McLean County, under directions of the then presiding judge thereof, immediately notified R. Biddle Roberts, Esq., of counsel herein, that the said report had been filed in said court, and that the same would be presented for confirmation and decree thereon on the said 26th day of April, 1880.

And our petitioner further represents that said R. Biddle Roberts, Esq. was fully notified on the filing of the said report of said special master, and the contents of said report by the reading of the petition of your petitioner in this Honorable Court, of the 9th day of April, 1880, which said petition so read in the presence of the said R. Biddle Roberts, Esq., had annexed thereto a certified copy of the report of the said Special Master Beem, which report was read in open court in the presence of the said counsel, and that the said petition, to which said report was annexed, contained the averment that application would be made for the confirmation of said report of said Special Master Beem, on the 26th day of April, 1880, before the said Circuit Court of McLean County.

That your petitioner, by counsel, did appear before the said Circuit Court of McLean County, on the first day of the April Term thereof, to wit, on the 26th day of

April, 1880, and moved the court to enter a decree upon said report of said Special Master Beem, thereby confirming and approving the same in all things; and that although no objections had been filed or taken to said report of said special master, one Robert E. Williams, a member of the bar of said Circuit Court of McLean County, and formerly counsel for the complainants in the above entitled cause, appeared and opposed the confirmation of said report, as your petitioner is informed and believes; that the said Circuit Court of McLean County, after hearing the said motion for the confirmation of said report of said Special Master Beem, made and entered a decree fully approving and confirming said report of said Special Master Beem in all things, a certified copy of which decree is hereto attached and marked Exhibit "C."

Your petitioner further represents that in and by the said decree so confirming and approving the said report of the said Special Master Beem, as aforesaid, the said Circuit Court of McLean County decreed that your petitioner was entitled to receive the sum of twenty-four thousand five hundred and thirty-five dollars and eighty cents ($24,535.80) as compensation for services as receiver in the said cause of Kelley *et al.* against the said defendant railroad company, and the further sum of one thousand dollars for expenses necessarily paid out by your petitioner in and about the business of said receivership, which said decree of said Circuit Court of McLean County still remains in full force and effect and unsatisfied.

Your petitioner hereby presents the said decree of the said Circuit Court of McLean County, and prays that your Honor will enter an order herein, thereby allowing to your petitioner said sums of money so decreed in favor of your petitioner in and by said decree of the Circuit Court of McLean County as aforesaid, and direct an order that the same be paid to your petitioner out of any funds

now in the hands of this court, or that may hereafter come into this court, or into the hands of any of its officers, in the above-entitled cause.

FRANCIS E. HINCKLEY.

G. W. KRETZINGER,
Solicitor for Petitioner.

GEO. W. COTHRAN,
Of Counsel for Petitioner.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

Francis E. Hinckley, on oath, states that he is the person named in the foregoing petition; and that he has read the same and knows the contents thereof; and that the same is true as therein stated and set forth, except as to matters and things stated on information and belief, and as to those matters he verily believes the same to be true.

FRANCIS E. HINCKLEY.

Subscribed and sworn to before me this 30th day of April, 1880.

CHARLES E. BYRNE,
Notary Public.

(Endorsed): Filed May 5, 1880.

J. A. JONES, *Clerk.*

EXHIBIT "A."

STATE OF ILLINOIS, } ss.
McLEAN COUNTY, }

In the Circuit Court of said County.

JOSEPH H. KELLEY ET AL.
v.
THE GILMAN, CLINTON AND SPRINGFIELD RAILROAD COMPANY, ET AL.

To the Honorable O. F. Reeves, Judge of the Circuit Court of the County of McLean, in the State of Illinois, in chancery sitting:

In pursuance of the order of this court made in the above entitled cause on the 11th day of March, A. D. 1880, whereby the matters named in said order were referred to me as special master in chancery of this court to take evidence in relation to the same, and to report my findings thereon, I, the said special master, do hereby respectfully certify and report, that notice having been given to the above complainant, Joseph J. Kelley, and the defendant railroad company, and being attended by counsel, there appeared before me, Francis E. Hinckley, Samuel C. Smith, John E. Blunt and Eugene Ellery, witnesses on behalf of the said Francis E. Hinckley, late receiver of the railroad of the defendant railroad company, and that they were examined upon oath, *viva voce*, as such witnesses, and that their testimony so given and reduced to wrtiing is contained in a schedule hereto annexed and marked No. 1.

I do further certify and report that in my opinion the accounts of the said Francis E. Hinckley, as late receiver of the Gilman, Clinton and Springfield Railroad, and the reports of his acts and doings as such, made to the above

court from time to time, attached to the testimony of the said Francis E. Hinckley, and marked Exhibit "A," are correct.

I further find and report that all the books and accounts of the said Francis E. Hinckley, as such receiver, were fully and thoroughly examined by four auditors appointed in the above cause by this Honorable Court, and that the said auditors found said books and accounts accurate and correct in all things except to the sum of twenty-eight cents, which was charged against the said Francis E. Hinckley, when it should have been credited.

I find from an examination of said accounts that the said Francis E. Hinckley charged and retained for compensation for his services as such receiver, two and one-half per cent. upon the receipts and disbursements made by him, as such receiver, which aggregates the sum of twenty-four thousand five hundred and thirty-five dollars and eighty cents ($24,535.80), and that he was appointed receiver in the above cause on the 24th day of November, A. D. 1873, and from thence managed and operated the road of the above defendant railroad company, as such receiver, under the orders of this court, until the 28th day of August, 1875, at which last date he was discharged by an order entered in the above cause by this Honorable Court, to which order reference is here made, and that he continued to perform necessary services in closing up his accounts with said estate for more than three months thereafter.

I further find and report that in my opinion the said sum of twenty-four thousand five hundred and thirty-five dollars and eighty cents so retained by the said Hinckley as compensation for his services as such receiver, is reasonable. In addition to these services rendered, it appears from the evidence that the said Hinckley, as such receiver, in the course of the discharge of his duties, and in and about the same, he paid for personal expenses what

he estimates at the sum of five hundred dollars per annum, which expenses were not stated in his accounts.

It is therefore my opinion, and I recommend that the said accounts of the said Francis E. Hinckley, as receiver of the railroad of the defendant railroad company, should be passed and approved, and his reports in relation thereto approved and confirmed in all things, and that the said sum of twenty-four thousand five hundred and thirty-five dollars and eighty cents, be allowed him for compensation for services as such receiver, and that he be further allowed the said sum of one thousand dollars for moneys paid out by him, as such receiver, in and about his discharge of the duties of said receivership, as above found.

MARTIN BEEM,
Special Master.

STATE OF ILLINOIS, }
McLEAN COUNTY, } ss.

I, J. C. McFarland, clerk of the Circuit Court of McLean County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the report of master filed in our said court, in a certain cause therein pending on the chancery side thereof, wherein Joseph J. Kelley *et al.*, are complainants, and the Gilman, Clinton and Springfield Railroad Company are defendants, except the exhibits and evidence. I further certify that said court adjourned on the 5th day of April, 1880, for the February Term, 1880.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Bloomington, Ill., this 5th day of April, A. D. 1880.

J. C. McFARLAND, *Clerk.*
By M. E. FERGUSON, *Deputy.*

(Endorsed):
Filed May 5, 1880.
J. A. JONES, *Clerk.*

EXHIBIT " C."

STATE OF ILLINOIS, } SS.
McLEAN COUNTY, }

In the Circuit Court of said County.

JOSEPH J. KELLEY ET AL., }
v. }
THE GILMAN, CLINTON AND SPRINGFIELD RAILROAD COMPANY ET AL }

And now this cause coming on to be heard, and it appearing to the court that a petition of Francis E. Hinckley, receiver of the above defendant railroad company, filed herein, and the report of Martin Beem, a special master in chancery of this court, appointed by an order of reference upon said petition of said Hinckley, to whom was referred the matters and things in said petition of Hinckley contained; and it appearing to the court that Joseph J. Kelley, the principal complainant, and the Gilman, Clinton and Springfield Railroad Company, the principal defendant in the above cause, were duly notified of the time and place appointed by said special master in chancery to take evidence and report his findings upon the matters and things contained in said petition of said Hinckley; and said testimony having been taken, and the findings thereon made by the said special master;

Now, therefore, this cause comes on to be heard on the said report of said special master, and the court being duly advised in the premises, it is ordered, adjudged and decreed that the said report be and is hereby approved and confirmed in all things, and the said accounts of the said Francis E. Hinckley, as receiver of the railroad of the above defendant railroad company, are hereby passed and approved, and his reports of his acts and doings as such receiver are hereby approved and confirmed in all things,

and the compensation for services, of twenty-four thousand five hundred and thirty-five dollars and eighty cents, ($24,535.80) and allowance of expenses of the sum of one thousand dollars, recommended by the said Martin Beem, as special master, to the said Francis E. Hinckley, for compensation for services rendered by him as such receiver in the above cause are hereby allowed and approved, and the costs of this proceeding to be paid by Francis E. Hinckley.

(Certificate of clerk that the above is correct.)

Filed May 5, 1880.

And afterwards, to wit, on Monday the 10th day of May, at the January Term of said court, in the year aforesaid, the following proceedings were had in said court and entered of record in said cause, to wit:

(Title of cause.)

And now, on this 10th day of May, 1880, comes Francis E. Hinckley, and brings into court the sum of $22,868.63, in discharge and satisfaction of the order entered in this cause on September 25, 1876, and of the attachment issued in this cause against him on the 3d of April, 1880.

And it is ordered by the court that said sum be deposited in the registry of the court, subject to the further order of the court as to the proper disposition of the same.

And afterwards, to wit, on Wednesday, the 21st day of July, at the June Term of said court, in the year aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

FINAL decree.

(Title of cause.)

The petition of Francis E. Hinckley, filed May 5, 1880, herein, having been heretofore argued by the counsel of the respective parties, and considered by the court,

it is ordered that the prayer of the said petition be refused and the same be dismissed with costs.

And then afterwards, to wit, on Monday the 26th day of July, at the term and in the year last aforesaid, the following further proceedings were had in said court and entered of record in cause, to wit:

ORDER allowing appeal.

(Title of cause.)

And now on this day comes Francis E. Hinckley, intervening petitioner herein, and prays an appeal to the Supreme Court of the United States from the decree of the court heretofore made on the 21st day of July instant, dismissing his petition herein, which is allowed by the court upon his giving bond with security satisfactory to the court; and the said Hinckley thereupon files his bond, with Joseph K. Barry, J. Irving Pearce and George W. Cothran as securities, in the penal sum of six thousand dollars, which is approved by the court, and the said bond is made a *supersedeas*.

And afterwards, to wit, on said 26th day of July, in the year aforesaid, came said petitioner, by his attorneys, and filed in the said clerk's office his appeal bond in said cause, which is in the following words, to wit:

APPEAL BOND.

Supreme Court of the United States.

(Title of cause.)

[Here follows bond.]

Filed July 26, 1880.

(Title of cause.)

Of December Term, in the year of our Lord one thousand eight hundred and eighty.

Afterwards, to wit, on the first Monday of December, in this same term, before the Justices of the Supreme Court of the United States, at the capitol in the city of

Washington, comes the said Francis E. Hinckley, appellant, by Leonard Swett, his attorney, and says that in the record and proceedings aforesaid there is manifold error in this, to wit:

1. That said Circuit Court erred in refusing the prayer of the petition of said Francis E. Hinckley, and in dismissing said petition.

2. That said Circuit Court erred in holding and deciding that the question of the compensation of said Francis E. Hinckley, as receiver in the *Kelley* case, had been determined by the Supreme Court of the United States on a former appeal taken by him from another order made in this cause.

3. There being no other claimant for the moneys in court in this cause, and none of the facts set forth in said Hinckley's petition being denied, he was entitled to the moneys as matter of right.

4. Said Circuit Court erred in refusing to hold that the decree entered upon the report of Special Master Beem was a final and conclusive determination, of a court of competent jurisdiction, of the compensation due to said Hinckley as receiver, and in disregarding said decree and overruling said Hinckley's claim based thereon.

And the said Francis E. Hinckley prays that the judgment, order or decree aforesaid may be reversed, annulled and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment.

LEONARD SWETT,

Attorney for Appellant and Plaintiff in Error.